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05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 BONNIE M. MOSELEY, ) CASE NO. C05-1405-TSZ  
08 )  
09 Plaintiff, )  
10 )  
11 v. ) REPORT AND RECOMMENDATION  
12 ) RE: SOCIAL SECURITY  
JO ANNE B. BARNHART, Commissioner ) DISABILITY APPEAL  
of Social Security, )  
Defendant. )  
\_\_\_\_\_ )

13 Plaintiff Bonnie M. Moseley proceeds through counsel in her appeal of a final decision of  
14 the Commissioner of the Social Security Administration (Commissioner). The Commissioner  
15 denied plaintiff's applications for Disability Insurance (DI) benefits and Supplemental Security  
16 Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ).

17 Having considered the ALJ's decision, the administrative record (AR), and all memoranda  
18 of record, it is recommended that this matter be REMANDED for an award of benefits.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1960.<sup>1</sup> She has an 11th grade education that included special

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22 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with the  
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 education classes in math and reading. Plaintiff previously worked as a housekeeper/maid.

02 Plaintiff filed applications for DI and SSI in March 2000, alleging disability beginning  
03 March 19, 1998 due to a learning disorder and back injury. (*See* AR 16.) Plaintiff's applications  
04 were denied initially and on reconsideration, and she timely requested a hearing. ALJ John F.  
05 Bauer held a hearing on March 12, 2002. The ALJ heard testimony from plaintiff and plaintiff's  
06 independent living counselor, Karen Powell. (AR 30-62.) On June 10, 2002, ALJ Bauer issued  
07 a decision finding plaintiff not entitled to DI or SSI. (AR 15-27.)

08 Plaintiff appealed the ALJ's decision to the Appeals Council, which declined to review  
09 plaintiff's claim. (AR 7-9.) Plaintiff appealed the Commissioner's decision to this Court, and  
10 subsequently accepted the Commissioner's Offer of Judgment remanding the case for further  
11 proceedings. (AR 432-35.) In January 2003, while the action was pending in this Court, plaintiff  
12 filed a second application for SSI benefits, again alleging disability since 1998. (AR 658-61.) This  
13 application was consolidated with the existing application. (*See* AR 438.)

14 ALJ Edward Nichols held a hearing on the consolidated applications on February 9, 2005.  
15 (AR 685-727.) The ALJ heard testimony from plaintiff, vocational expert Robert Aslan, and  
16 medical expert Tom Dooley, Ph.D. On June 11, 2005, ALJ Nichols issued a decision finding  
17 plaintiff not entitled to DI or SSI. (AR 413-30.)

18 Plaintiff appealed the final decision of the Commissioner to this Court.

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22 official policy on privacy adopted by the Judicial Conference of the United States.

01 **JURISDICTION**

02 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

03 **DISCUSSION**

04 The Commissioner follows a five-step sequential evaluation process for determining  
05 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
06 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not  
07 engaged in substantial gainful activity since her alleged onset date. At step two, it must be  
08 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's  
09 borderline intellectual functioning, learning disabilities, depression, and alcohol dependence severe.  
10 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ  
11 found that plaintiff's impairments did not meet or equal a listed impairment. If a claimant's  
12 impairments do not meet or equal a listing, the Commissioner must assess residual functional  
13 capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to  
14 perform past relevant work. If a claimant demonstrates an inability to perform past relevant work,  
15 the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the  
16 capacity to make an adjustment to work that exists in significant levels in the national economy.  
17 The ALJ here determined that, when using alcohol, plaintiff did not have the RFC to perform her  
18 past relevant work or any other work existing in significant numbers in the national economy. The  
19 ALJ then concluded that, when not using alcohol, plaintiff could perform her past relevant work.

20 This Court's review of the ALJ's decision is limited to whether the decision is in  
21 accordance with the law and the findings supported by substantial evidence in the record as a  
22 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more

01 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
02 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
03 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
04 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
05 2002).

06 In this case, plaintiff primarily argues that the ALJ improperly assessed the materiality of  
07 her alcoholism and erred in not finding her personality disorder and schizophrenic/psychotic  
08 disorder severe at step two. Plaintiff also raises supplemental arguments concerning the ALJ's  
09 step two, three, and four findings, as well as the ALJ's consideration of the opinions of her health  
10 care providers, the testimony of the medical expert, and the testimony of her independent living  
11 counselor. Neither plaintiff's opening brief, nor reply brief specifies a request for relief for either  
12 further administrative proceedings or an award of benefits.

13 The Commissioner argues that the ALJ applied the correct legal standards, supported his  
14 decision with substantial evidence, and should be affirmed. The Commissioner alternatively argues  
15 that plaintiff's alleged errors would, at most, warrant remand for further administrative  
16 proceedings.

17 For the reasons described below, the undersigned concludes that this matter should be  
18 remanded for an award of benefits.

19 Consideration of Drug Addiction or Alcoholism

20 An individual is not considered to be disabled if drug addiction or alcoholism (DAA) would  
21 be a contributing factor material to a determination of disability. 42 U.S.C. §§ 423(d)(2)(C),  
22 1382c(a)(3)(J). Implementing regulations governing the consideration of DAA state: "If we find

01 that you are disabled and have medical evidence of your drug addiction or alcoholism, we must  
02 determine whether your drug addiction or alcoholism is a contributing factor material to the  
03 determination of disability.” 20 C.F.R. §§ 404.1535(a), 416.935(a). The “key factor” in this  
04 determination is whether an individual would still be found disabled if he or she stopped using  
05 drugs or alcohol. *Id.* at §§ 404.1535(b)(1), 416.925(b)(1). The regulations further state that, in  
06 making such a determination, “we will evaluate which of your current physical and mental  
07 limitations, upon which we based our current disability determination, would remain if you  
08 stopped using drugs or alcohol and then determine whether any or all of your remaining limitations  
09 would be disabling.” *Id.* at §§ 404.1535(b)(2), 416.925(b)(2). DAA is deemed material if the  
10 remaining limitations would not be disabling, and not material if those limitations would be  
11 disabling. *Id.* As with each of the first four steps of the disability evaluation process, the claimant  
12 bears the burden of showing that his or her drug or alcohol addiction is not a contributing factor  
13 material to his or her disability. *Ball v. Massanari*, 254 F.3d 817, 821 (9th Cir. 2001).

14 In the present case, the accepted Offer of Judgment remanding this matter required the  
15 ALJ to, *inter alia*, evaluate whether plaintiff’s alcohol abuse is a material factor, and to provide  
16 a function-by-function assessment of her ability to perform work-related mental activities both  
17 with and without consideration of her alcoholism. (*See* AR 414, 434.) Also, the Appeals Council  
18 directed the ALJ as follows:

19 . . . In considering whether DAA is **material**, decide: 1) which of the current physical  
20 and mental limitations upon which the claimant was found disabled would remain if  
21 the individual stopped using drugs or alcohol and (2) again in accordance with the  
sequential evaluation process, whether the remaining limitations would still be  
disabling.

22 (AR 438 (internal citations omitted.))

01 After assessing plaintiff's impairments at step two, the ALJ found that, even when  
02 drinking, plaintiff was not impaired enough to meet a listing at step three. (AR 422-23.) The ALJ  
03 then determined at steps four and five that, when plaintiff used alcohol, she was unable to do any  
04 of her past relevant work or any other work existing in significant numbers in the national  
05 economy due to her inability to sustain a full time work schedule. (AR 428.) He subsequently  
06 found that, if plaintiff did not use alcohol, she could perform "simple, repetitive work with no  
07 close supervision and no contact with the public[.]" including her past relevant work as a  
08 housekeeper/maid. (*Id.*) The ALJ, therefore, concluded that plaintiff's alcohol use was a  
09 contributing factor material to the determination of disability. (*Id.*) He added:

10 The claimant's counsel argues that the Agency's 1996 "policy" memo controls-if it  
11 cannot be determined whether the claimant would be disabled if she stopped abusing  
12 alcohol, in essence the tie goes to the claimant. However, in this case, there is no  
13 such ambiguity. The evidence clearly shows that with alcohol use the claimant cannot  
14 work, and without alcohol use, she can work. In addition, counsel is apparently  
unfamiliar with *Ball v. Massanari*, 254 F.3d 817 (9th Cir. 2001), which places the  
burden on the claimant to show that her substance abuse is not material once it is an  
issue. She has not met this burden. She admits she is a regular drinker now and she  
admits she was able to work when she was drinking.

15 (AR 429.)

16 Plaintiff alleges the ALJ failed to appropriately assess the materiality of her alcoholism.  
17 She additionally points to the ALJ's step three finding that she did not meet the criteria of any  
18 mental listing even when she is drinking (AR 422), as conflicting with his later finding that she is  
19 disabled at step four with consideration of her use of alcohol (AR 429-30).

20 Plaintiff also argues that the ALJ erred in not finding her disabled given the intertwined  
21 nature of her severe mental impairments and the impairment of her alcohol use. *See* Emergency  
22 Teletype (August 30, 1996) ("EM-96200"), Answer 29 ("When it is not possible to separate the

01 mental restrictions and limitations imposed by DAA and the various other mental disorders shown  
02 by the evidence, a finding of ‘not material’ would be appropriate.”) (available at  
03 <http://www.ssas.com/daa-q&a.htm>). She points to the testimony of Dr. Dooley, the medical  
04 expert, as supporting this argument. (See AR 720-22 (quoted below.)) Plaintiff further disputes  
05 the ALJ’s characterization of Dr. Dooley’s testimony, noting he testified it would be hard to say  
06 whether the “*psychotic*” portion of her diagnosis would remain absent consideration of alcohol,  
07 not, as stated by the ALJ, that “it would be hard to say if [she] still would have *psychiatric*  
08 disorders.” (See AR 422 and 719.)

09         The Commissioner responds that the ALJ’s analysis of plaintiff’s alcohol use is consistent  
10 with Ninth Circuit law – first addressing plaintiff’s alleged disability with consideration of alcohol  
11 abuse, and then without consideration of alcohol abuse. (See AR 422-29.) She further argues that,  
12 even if the ALJ erred in finding plaintiff did not meet a listing even with consideration of her  
13 alcohol abuse, such error does not alter the ultimate conclusion, supported by the record as a  
14 whole, that plaintiff was able to work when she was not abusing alcohol.

15         The Commissioner notes that ALJs are expected to abide by EM-96200, even though it  
16 is not published in the Federal Register or the Code of Federal Regulations and, as such, does not  
17 carry the force and effect of law. See, e.g., *Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir.  
18 2003). However, the Commissioner avers that, even if plaintiff rationally interprets Dr. Dooley’s  
19 testimony, the ALJ’s interpretation that Dr. Dooley testified that plaintiff’s overriding impairment  
20 was alcohol abuse is equally rational and should stand. See *Thomas*, 278 F.3d at 954 (if there is  
21 more than one rational interpretation, one of which supports the ALJ’s decision, the Court must  
22 uphold that decision).

01 As directed by the governing regulations, after finding plaintiff disabled with consideration  
02 of alcohol, the ALJ was required to reassess plaintiff pursuant to the five step process, considering  
03 which of plaintiff's limitations would remain and whether any or all of those remaining limitations  
04 would be disabling. 20 C.F.R. §§ 404.1535(b)(2), 416.925(b)(2). ( *See also* AR 438 (Appeals  
05 Council's directive quoted above.)) The ALJ failed to conduct such an analysis in this case.  
06 Instead, although appropriately assessing plaintiff at steps one through five with consideration of  
07 her alcohol use, the ALJ then skipped ahead to step four and perfunctorily considered plaintiff  
08 without consideration of her use of alcohol. The ALJ's mismatched step three and four findings  
09 with consideration of plaintiff's use of alcohol, while arguably harmless standing alone,  
10 underscores the ALJ's flawed DAA analysis as a whole.

11 The undersigned also rejects the Commissioner's argument as to Dr. Dooley's testimony.  
12 As an initial matter, while the ALJ clearly reached this opinion himself, he states nowhere in his  
13 decision that Dr. Dooley opined that plaintiff's overriding impairment was alcohol abuse. Instead,  
14 the ALJ states that Dr. Dooley testified that plaintiff's "chronic alcohol use complicated her  
15 psychiatric picture[,]” and that “if the alcohol was taken away, it would be hard to say if the  
16 claimant still would have any psychiatric disorders.” (AR 422.) As noted by plaintiff, Dr. Dooley  
17 actually stated that it was “hard to say if she would still have the *psychotic* portion.” (AR 719  
18 (emphasis added.)) Moreover, taken as a whole, the undersigned does not find the Commissioner's  
19 interpretation of Dr. Dooley's testimony equally rational to that suggested by plaintiff. In addition  
20 to the above, Dr. Dooley testified, when asked about the “B” criteria for mental listings: “Well,  
21 like I said, Your Honor, the alcohol sort of clouds everything out.” (AR 721.) When the question  
22 was rephrased as, “But in terms of the listings, the functional limitations, you're just not able to



comment or are you able to? Where are we?”, Dr. Dooley stated: “I can’t, I can’t, I don’t feel I have enough here to qualify for how she would function without alcohol because it seems to be a common pollutant in her life.” (*Id.*) Contrary to the ALJ’s assertion, therefore, this testimony presents an ambiguity in the evidence and supports plaintiff’s contention that it is not possible to “separate the mental restrictions and limitations imposed by DAA and the various other mental disorders shown by the evidence[.]” EM-96200.<sup>2</sup>

Finally, as discussed below, the ALJ erred at step two. The errors at that step necessarily implicate the ALJ’s assessment of plaintiff both with and without consideration of her use of alcohol. Accordingly, for all of these reasons, the undersigned concludes that the ALJ’s DAA assessment is not supported by substantial evidence and necessitates remand.

#### Assessment of Impairments at Step Two

At step two, the ALJ must determine whether the claimant has a medically severe impairment or combination of impairments. Step two has been characterized as “a de minimis

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<sup>2</sup> Compare *Brueggemann v. Barnhart*, 348 F.3d 689, 693-95 (8th Cir. 2003) (“If the ALJ is unable to determine whether substance use disorders are a contributing factor material to the claimant’s otherwise-acknowledged disability, the claimant’s burden has been met and an award of benefits must follow. In colloquial terms, on the issue of the materiality of alcoholism, a tie goes to *Brueggemann*.”; finding ALJ failed to follow proper procedures for evaluating materiality of substance use disorder) (internal citations to, *inter alia*, EM-96200 omitted), with *Vester v. Barnhart*, 416 F.3d 886, 889-92 (8th Cir. 2005) (“After considering all of the evidence under the substantial evidence standard, we are satisfied that the ALJ case untangled Ms. Vester’s history of alcoholism and mental illness with sufficient clarity and detail to support the finding that she is not disabled apart from her alcoholism. In contrast to other cases involving alcohol abuse that have been remanded to the ALJ for reconsideration, the ALJ followed the analytical framework prescribed by the regulations, made detailed factual findings about Vester’s depression and alcoholism, and supported his findings with references to the record. We conclude that a reasonable person considering the record as a whole could reach the conclusion adopted by the ALJ.”) (internal citations to, *inter alia*, *Brueggemann* omitted).

01 screening device to dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th  
02 Cir. 1996). “An impairment or combination of impairments can be found ‘not severe’ only if the  
03 evidence establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s  
04 ability to work.’” *Id.* (internal citations omitted.)

05 In this case, the ALJ found plaintiff’s borderline intellectual functioning, learning  
06 disabilities, depression, and alcohol dependence severe at step two. (AR 422.) He went on to  
07 state:

08 The claimant has some scattered diagnoses of schizophrenia and psychosis, NOS  
09 based on her description of occasional auditory hallucinations, but these  
10 hallucinations, per the claimant’s own report, appear to happen only when she is  
11 drinking. In May 2004 a mental health clinic determined that the claimant did not  
12 have a confirmed diagnosis of any psychotic related disorder that would qualify her  
13 for treatment at their clinic (Exhibit 49F, pg. 5). Based on the medical record, I find  
14 that the claimant’s alleged schizophrenia/psychotic disorder is not a medically  
determinable impairment. Several medical professionals have mentioned that the  
claimant might have a personality disorder, but it is mainly a rule-out diagnosis, so I  
find that it is not a medically determinable impairment. Although the claimant has  
periodically complained of back pain and of other physical problems, there is no  
objective evidence that the claimant has any medically determinable physical  
impairments (Exhibit 11F).

15 Medical expert Tom Dooley, Ph.D. testified at the hearing that the claimant’s chronic  
16 alcohol use complicated her psychiatric picture. The doctor stated that if the alcohol  
17 was taken away, it would be hard to say if the claimant still would have any  
psychiatric disorders.

18 (*Id.*)

19 Plaintiff contends the ALJ erroneously rejected her personality disorder and schizophrenia  
20 or psychotic disorder as severe,<sup>3</sup> and, consequently, failed to assess the degree of functional

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22 <sup>3</sup> Plaintiff also points to her anxiety, noting Dr. Kerry Bartlett identified marked and  
frequent restrictions stemming from an anxiety-related disorder in a March 5, 2002 questionnaire.

01 limitation imposed by those impairments. *See* 20 C.F.R. §§ 404.1520a and 416.920a (setting forth  
02 four functional areas to be reviewed in evaluation of mental impairments: (1) activities of daily  
03 living, (2) social functioning, (3) concentration, persistence and pace, and (4) episodes of  
04 decompensation). She rejects the ALJ's contention that her personality disorder was mainly a  
05 rule-out diagnosis as contrary to ALJ Bauer's finding (*see* AR 17), as well as the opinions of  
06 medical providers whose opinions the ALJ gave weight, including Dr. Dooley and DDS reviewers  
07 Drs. William Lysak and Kristine Harrison (*see* AR 175, 201, 239, 422, 425, 720). Plaintiff also  
08 points to evidence in the record supporting severe schizophrenia or psychotic disorder, including,  
09 but not limited to, the medical expert's testimony. (*See, e.g.*, AR 210, 267, 560, 625, 720.) She  
10 further argues that the ALJ wrongly dismissed this condition as existing only while she was  
11 drinking and did not accurately summarize the May 2004 mental health clinic intake note he relied  
12 upon in dismissing the severity of this condition. ( *See, e.g.*, AR 208 and 381 (Dr. Nathan  
13 Kronenberg, who diagnosed anti-psychotic medication, noted that claimant drank beer on three  
14 separate occasions, but remained free of auditory hallucinations, and later opined that plaintiff's  
15 psychotic disorder would continue regardless of her use of alcohol) and AR 632 (May 2004 intake  
16 form disqualified plaintiff because of lack of qualifying diagnosis *and* her previous failures at and  
17 poor indication for chemical dependency treatment)).

18       The Commissioner does not directly respond to plaintiff's arguments regarding personality  
19 disorder. With respect to schizophrenia or psychotic disorder, the Commissioner asserts that the  
20 ALJ based his assessment on mental health evaluations that did not confirm this diagnosis and  
21 \_\_\_\_\_  
22 (AR 373-74.) However, this questionnaire, standing alone, is not compelling evidence of a severe  
anxiety disorder.

01 activities of daily living inconsistent with plaintiff's level of alleged disability. (See AR 422 (ALJ's  
02 step two assessment), AR 168 (May 2000 report of Dr. Anselm Parlato not making a diagnosis  
03 of schizophrenia or psychotic disorder), and AR 632 (May 2004 mental health intake form.)) The  
04 Commissioner also points to the ALJ's reliance on plaintiff's reports that her hallucinations only  
05 occurred while she was drinking. (See AR 422 and 632.)

06 Plaintiff's reliance on Drs. Lysak and Dooley with respect to personality disorder is not  
07 helpful given that these physicians both, as reflected in the ALJ's analysis, only found the existence  
08 of a personality disorder "possible." (See AR 175, 201 (Dr. Lysak assessed possible personality  
09 disorder with mixed avoidant passive features) and AR 720 (Dr. Dooley testified: ". . . I think that  
10 there is a possibility of a personality disorder, avoidant, or dependent personality. It's not a strong  
11 diagnosis from the documentation.)) However, Dr. Harrison did diagnose a mixed personality  
12 disorder. (AR 239.) Also, the ALJ stated at hearing, "I think personality and schizoaffective are  
13 certainly there[]" (AR 724), and included personality disorder with other impairments he had  
14 deemed severe in finding number nine of his decision. (AR 430 ("When the claimant is not using  
15 alcohol, the claimant's medically determinable borderline intellectual functioning, *personality*  
16 *disorder*, and alcohol dependence do not prevent the claimant from performing her past relevant  
17 work.)) (emphasis added)).<sup>4</sup> The undersigned finds both the failure to directly address Dr.  
18 Harrison's firm diagnosis and the ALJ's inconsistent treatment of plaintiff's purported personality

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21 <sup>4</sup> As noted by plaintiff, this list of impairments conflicts with those listed in finding number  
22 two. (See AR 429-30 (finding plaintiff's borderline intellectual functioning, learning disabilities,  
depression, and alcohol dependence severe.))

01 disorder of concern.<sup>5</sup>

02       The undersigned also finds the ALJ's assessment of schizophrenia or psychotic disorder  
03 troublesome. The ALJ's reliance on plaintiff's testimony that her hallucinations occurred only  
04 while drinking is particularly problematic. The record is replete with references to plaintiff's  
05 unreliability as a historian and her difficulty in responding to questions. (*See, e.g.*, AR 165 and  
06 260 (Dr. Parlatore described plaintiff's responses to questions as vague and noted she "seemed  
07 perplexed, bewildered and forlorn[.]"), AR 210 (Dr. Kronenberg stated: "Based on her shyness  
08 and somewhat impaired memory she made a poor historian in spite of being aided by a DVR  
09 caseworker."), AR 211 (July 2000 mental health assessment form states: "Client very vague, may  
10 not be reliable reporter."), AR 260 (Dr. Gary Smith, in a discharge summary in 1994, stated: "Ms.  
11 Moseley was quite ambivalent in presenting her psychotic symptoms, variously reporting hearing  
12 voices and then seeming to indicate that they had not been present. . . . The presence of any  
13 delusions could not be determined because of the inability of the patient to discuss those with this  
14 examiner in any meaningful fashion."), AR 558-59 (Dr. Allan Fitz noted plaintiff was vague, had  
15 difficulty recalling specific details about her past, appeared easily confused, had difficulty  
16 understanding questions, and needed frequent clarification.)) Plaintiff's testimony on this point  
17 is also difficult to decipher. For example, the ALJ and plaintiff engaged in the following exchange  
18 regarding a time period when plaintiff was hearing voices:

19       Q       Okay. Was this when yuo [stet] were drinking? When you're not drinking I  
20               think you said you don't hear them so much.

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21       <sup>5</sup> The undersigned also takes note that ALJ Bauer previously found plaintiff's personality  
22 disorder severe. (AR 26.) ALJ Nichols incorporated ALJ Bauer's decision by reference as a  
"summary and discussion of the evidence." (AR 414.)

01           A       Yeah. I *wasn't* drinking when I was hearing him.  
02 (AR 716-17 (emphasis added.)) Additionally, while the ALJ reported plaintiff as stating she only  
03 had hallucinations “when she ‘coming off a drunk.’” [stet] (AR 427), plaintiff testified at one point  
04 that she “was *probably* coming down off of it from drinking.” (AR 707-08 (emphasis added.))<sup>6</sup>

05           Moreover, in addition to nurses and social workers, several acceptable medical sources  
06 diagnosed plaintiff with schizophrenia and/or psychosis. ( *See* AR 210 (Dr. Kronenberg found  
07 episodes of psychosis as manifested by delusions and hallucinations related to periods of stress);  
08 AR 267 (Dr. Gary Smith diagnosed psychotic disorder NOS, probable schizophrenia, improved);  
09 AR 560 (Dr. Allan Fitz reported history of paranoid features and possible hallucinations due to  
10 either alcohol use or underlying psychiatric diagnosis of schizoaffective disorder); AR 625 (Dr.  
11 W. Douglas Uhl diagnosed psychotic disorder.)) (*See also* AR 724 (ALJ’s statement that: “I think  
12 personality and schizoaffective are certainly there.”)) To say that these diagnoses were “scattered”  
13 or that this condition does not rise to the level of a medically determinable impairment is an  
14 understatement. Also, not all of the ALJ’s criticisms of these physicians’ opinions withstand  
15 scrutiny. For example, the ALJ gave significant weight to Dr. Fitz’s opinion that – “Without  
16 alcohol dependence, Bonnie would likely have some potential for being employed[.]” (AR 426  
17 (citing AR 560.)) However, Dr. Fitz went on to state that plaintiff “would likely have continued  
18 moderate to marked difficulties due to her reported cognitive issues and moderate

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20           <sup>6</sup> Other testimony from plaintiff during the hearing exemplifies both the uncertain nature  
21 of her reporting and the extent of her mental health issues. For example, plaintiff testified that a  
22 woman who looks like Dolly Parton, whose name she did not know, had several months earlier  
come to her apartment and then driven her to California for a couple weeks worth of work on a  
game show at the MGM studio. (AR 691-94.) When asked whether this had really happened,  
plaintiff replied: “I think I was there.” (AR 693.)

01 depression/anxiety[,]" and that it was "not clear" whether her paranoid features and hallucinations  
02 were related to alcohol or schizoaffective disorder, adding that she "had difficulty providing details  
03 from her past that could have helped rule out this disorder." (AR 560.)<sup>7</sup>

04 Finally, in addition to inaccurately representing Dr. Dooley's testimony as described above,  
05 the ALJ did not mention Dr. Dooley's statement that plaintiff's periods of decompensation also  
06 appear related to stress. (AR 718-19.) Accordingly, for all of these reasons, the undersigned  
07 concludes that the ALJ's step two inquiry into plaintiff's purported personality disorder and  
08 schizophrenia or psychotic disorder does not withstand scrutiny and necessitates remand.<sup>8</sup>

09 Remand

10 The Court has discretion to remand for further proceedings or to award benefits. *See*  
11 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits  
12 where "the record has been fully developed and further administrative proceedings would serve  
13 no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

14 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient  
15 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that  
16 must be resolved before a determination of disability can be made; and (3) it is clear  
from the record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

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18 <sup>7</sup> The Commissioner cites a report from Dr. Parlatore as supporting the ALJ's assessment  
of this condition. (*See* Dkt. 14 at 12.) However, the ALJ did not point to Dr. Parlatore's report  
19 at step two and, in fact, later gave no weight to this physician's opinion. (*See* AR 422, 424-25.)  
Additionally, while Dr. Parlatore's report made no diagnosis of schizophrenia or psychotic  
20 disorder, it also wrongly reported "no history of psychosis, hallucinations, paranoia or  
delusions[,]" and "[n]o past psychiatric history." (AR 166-67.)

21 <sup>8</sup> Plaintiff raises an assortment of additional errors with respect to the ALJ's conclusions  
22 at steps two, three, and four. However, the undersigned finds it sufficient to report that the ALJ's  
step two errors and the flawed DAA analysis renders the decision unsupported as a whole.

01 *Id.* at 1076-77. In this case, in addition to the errors outlined above, the undersigned finds the  
02 record fully developed and concludes that the evidence compels a finding of disability.

03 As indicated above, Dr. Dooley was unable to render an opinion as to how plaintiff would  
04 function without alcohol. His testimony, therefore, supports a conclusion that plaintiff's alcohol  
05 use was not material to the determination of disability. ( *See* AR 721 (Dr. Dooley testified: "I  
06 can't, I can't, I don't feel I have enough here to qualify for how she would function without  
07 alcohol because it seems to be a common pollutant in her life.") and EM-96200 ("When it is not  
08 possible to separate the mental restrictions and limitations imposed by DAA and the various other  
09 mental disorders shown by the evidence, a finding of 'not material' would be appropriate."))

10 In addition, a review of the record in this case reveals relatively minimal evidence to  
11 support the ALJ's conclusion. (*See generally* AR 415-27.) Moreover, the evidence relied on by  
12 the ALJ and the reasoning proffered for that reliance is problematic in several respects. For  
13 example, the ALJ gave significant weight to Dr. Fitz's opinion that, without alcohol use, plaintiff  
14 "*might* be able to work[.]" (AR 426 (emphasis added; citing AR 560 ("Without alcohol  
15 dependence, Bonnie would likely have some potential for being employed . . .[.]")) However, in  
16 addition to the fact that this equivocal opinion is hardly compelling evidence in support of the  
17 ALJ's conclusion, the ALJ neglected to address the totality of Dr. Fitz's opinion on this point,  
18 including his acknowledgment of plaintiff's borderline intellectual functioning and "continued  
19 moderate to marked difficulties due to her reported cognitive issues and moderate  
20 depression/anxiety[]" as additional barriers to her ability to work. (AR 560.) Also, although the  
21 ALJ gave significant weight to the 1998 opinion of Dr. Bartlett finding plaintiff only moderately  
22 impaired, the undersigned finds equally significant Dr. Bartlett's recognition as to plaintiff's limited



01 awareness and her inadequacy as a historian of her condition. (*See* AR 154 (“Unfortunately  
02 Bonnie appeared to be quite limited in awareness of much of her early history, somewhat concrete  
03 in her appreciation of her current history and affective state, relatively shy, and limited in language  
04 skills, and thus the overall thoroughness and veracity of information presented in this section must  
05 be considered somewhat uncertain.”))<sup>9</sup>

06 Further, the ALJ’s consideration of several physicians’ opinions, including Drs. Donald  
07 Piro, Parlatore, Kronenberg, and Uhl, hinged in significant part on the ALJ’s assessment of  
08 plaintiff’s alcohol use and the accuracy of her reporting, a fact complicated by both the ALJ’s  
09 flawed DAA analysis and plaintiff’s documented unreliability as an historian. (*See* AR 424-26.)  
10 Finally, although it was not inappropriate for the ALJ to criticize interrogatories completed years  
11 after various physicians treated plaintiff, it should be noted that the ALJ had no difficulty in relying  
12 on the opinions of DDS physicians who never examined plaintiff. (*See* AR 424-25).

13 Based on the above, the undersigned concludes that the medical record as a whole  
14 supports a finding of disability and that further administrative proceedings would serve no useful  
15 purpose. The fact that plaintiff has already waited six years for her disability determination, and  
16 that additional proceedings would pose further delay, additionally weighs in favor of an award of  
17 benefits. *See Smolen v. Chater*, 80 F.3d at 1292 (noting seven-year delay and additional delay  
18 posed by further proceedings); *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985) (noting  
19 administrative proceedings would only prolong already lengthy process and delay benefits).

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20  
21 <sup>9</sup> (*See also* AR 369-75 and AR 424 (March 2002 interrogatories from Dr. Bartlett finding  
22 marked mental limitations in all areas and ALJ’s decision to not give weight to these  
interrogatories based on the lapse in time between their completion and when Dr. Barlett last saw  
plaintiff.))

**CONCLUSION**

For the reasons set forth above, this matter should be REMANDED for an award of benefits.

DATED this 23rd day of May, 2006.

  
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Mary Alice Theiler  
United States Magistrate Judge